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March 19, 2004

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MAR 19 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 02-277
(Additional Comment on UHF Discount)

Dear Ms. Dortch:

We are enclosing for filing an original and ten copies of Comments on behalf of Hearst-Argyle Television, Inc., in the above-referenced matter.

If any questions should arise during the course of your consideration of this matter, please feel free to contact me.

Sincerely,



Charles F. Marshall

CFM/bp
Enclosures

cc. Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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In the Matter of

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

2002 Biennial Regulatory Review—Review of the
Commission's Broadcast Ownership Rules and
Other Rules Adopted Pursuant to Section 202 of the
Telecommunications Act of 1996

MB Docket No. 02-277

To: The Commission

COMMENTS OF HEARST-ARGYLE TELEVISION, INC.

Preliminary Statement

Hearst-Argyle Television, Inc ("Hearst-Argyle"), which owns or manages 27 television broadcast stations, by its attorneys, respectfully submits the following comments in response to the Commission's Public Notice, released on February 19, 2004, in which the Media Bureau requested additional comment on the UHF discount in light of recent legislation affecting the national television ownership cap.

Since 1985, the Commission's rules have included a national audience reach limitation—known as a national television ownership cap—restricting the percentage of the nation's television households that may be served by television stations under common ownership and control.¹ The Commission's rules define "national audience reach" as "the total number of television households in the Nielsen Designated Market Areas (DMA) in which the relevant stations are located divided by the total national television households[.]"² The definition provides, further, that for

¹ 47 C.F.R. 73.3555(d)(1).

² 47 C.F.R. 73.3555(d)(2)(i)

purposes of calculating "national audience reach," UHF television stations are attributed with 50 percent of the television households in their DMA market.³

In the Telecommunications Act 1996 ("the 1996 Act")⁴ Congress directed the Commission to increase the ownership cap from 25 percent to 35 percent:

(1) NATIONAL TELEVISION OWNERSHIP LIMITATIONS.—The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)—

* * *

(B) by increasing the national audience reach limitation for television stations to 35 percent.

On June 2, 2003, after conducting a comprehensive review of its broadcast media ownership rules, the Commission increased the television ownership cap to 45 percent.⁵ In response to the Commission's action, Congress debated a number of proposals to restore the cap to 35 percent.

On January 22, 2004, President Bush signed into law the Consolidated Appropriations Act of 2004 ("CAA"), which amends the 1996 Act by directing the Commission to increase the cap from 35 percent to 39 percent. As described below, the CAA only adjusts the national audience reach *limitation*. It does not address the Commission's authority to modify the underlying *methodology* used to calculate national audience reach (i.e., the UHF discount). The failure of Congress to reference—much less affirmatively address—the UHF discount in the CAA confirms that Congress

³ *Id.*

⁴ P.L. 104-104, 110 Stat. 56, § 202(c) (1996).

⁵ 2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, ¶ 580 (2003) ("2002 Report and Order").

made no attempt to divest the Commission's authority to modify the UHF discount when it increased the national television ownership cap

Discussion

I. Congress Did not Codify the UHF Discount in the CAA.

It is a cardinal rule of construction that statutes must not be interpreted in a manner that produces an absurd or illogical result.⁶ Because neither the plain language of the CAA nor its legislative history addresses the UHF discount, it would be both absurd and illogical to conclude that Congress intended to "freeze" the UHF discount into law

A. Neither the Statutory Language Nor the Legislative History of the CAA Addresses—Much Less Codifies—the UHF Discount.

Of all the Commission's new ownership rules issued in its June 2, 2003, *Report and Order*, no rule generated more controversy, triggered more criticism from Congress, or garnered the attention of so many ideologically diverse interest groups than the rule increasing the national television ownership cap from 35 to 45 percent.⁷ Ultimately, Congress included a provision in the CAA that amended the 1996 Act by directing the Commission to increase the national ownership cap from 35 percent to 39 percent:

⁶ See *United States v. Turkette*, 452 U.S. 576, 580 (1981).

⁷ 149 Cong. Rec. S11505 (Sept. 16, 2003)(statement of Sen. Stevens)("the issue that has received the most support and attention from my colleagues and from diverse interest groups is the 35 percent cap issue"); 149 Cong. Rec. H7283 (July 22, 2003)(Statement of Rep. Burr)(urging colleagues to vote against an amendment to override other media ownership rules as "a poison bill" to the effort to restore the 35% cap); 149 Cong. Rec. H7279 (July 22, 2003)(statement of Rep. Obey)(urging colleagues to address *only* the 35 percent cap during on the Commerce-State-Justice appropriations bill because "you have to make an intelligent judgment about how much you can bite off and win."); See Frank Ahrens, "Unlikely Alliances Forged in Fight Over Media Rules," *The Washington Post*, May 20, 2003, page E1; William Safire, "Localism's Last Stand," *The New York Times*, July 17, 2003.

Sec. 629. The Telecommunications Act of 1996 is amended as follows—

(1) in Section 202(c)(1)(B) by striking “35 percent” and inserting “39 percent”

* * *

The legislative history of this specific provision of the CAA confirms what is obvious from its face—that Congress intended to legislate solely on the cap and made no mention of the UHF discount.

The original bills introduced in the House and Senate (H.R. 2052 and S. 1046)⁸ sought to codify the “national audience reach limitation” at 35 percent. Although the bills, as introduced, would have codified the Commission’s definition of “national audience reach,” both bills specifically *omitted* the language from the Commission’s ownership rule specifying how UHF stations are to be counted (*i.e.*, that, for purposes of calculating national audience reach, UHF stations are attributed with 50 percent of the television households in their DMA market). By excluding the UHF discount provision from the definition of “national audience reach” both bills sent the unmistakable, unambiguous message that the drafters intended to codify the definition of “national audience reach” without addressing the UHF discount. S. 1046 was reported out of the Senate Commerce Committee, and nothing in the amended bill, nor any language in the accompanying committee report, addressed the UHF discount.

While S. 1046 was awaiting consideration by the Senate, the House and Senate Appropriations Committees approved language on the Commerce-Justice-State (CJS) appropriations

⁸ H.R. 2056, 108th Cong., 1st Sess. (May 9, 2003); S. 1046, 108th Cong., 1st Sess. (May 13 2003).

bill to extend the 35 percent cap.⁹ The language in the CJS bills referred to the Commission's definition of "national audience reach" but—like the original 35 percent cap bills—did not address the UHF discount:

None of the funds in this Act may be used to grant, transfer or assign a license for a commercial TV broadcast station to any party . . . if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers, or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in TV stations which *have an aggregate national audience reach, as defined in 47 CFR 73.3555, exceeding 35 percent.* (Emphasis added.)

When the House and Senate appropriations bills were merged into the CAA, the White House reiterated that it would recommend the President veto the bill if it included the provision to extend the existing 35 percent cap—again with no specific reference to the UHF discount.¹⁰ Ultimately, the White House and Senate Appropriations Chairman Ted Stevens arrived at a compromise to instruct the FCC to set the cap at 39 percent. The final language of the compromise bill—as all previous bills—failed to address the UHF discount. Indeed, the CAA did not even incorporate language from the original bills codifying the term "national audience reach." Having failed to address "national audience reach," either explicitly (as proposed in H.R. 2052 and S. 1046) or implicitly (as proposed in H.R. 2799 or S. 1585), there is no basis to conclude the CAA addresses—much less codifies—the UHF discount.

There also is no merit to the suggestion that Congress's mere recitation of the term "national audience reach" in the 1996 Act "froze" the Commission's definition of that term into law and

⁹ H.R. 2799, 108th Cong., 1st Sess. (July 22, 2003); S. 1585, 108th Cong., 1st Sess. (Sept. 5, 2003).

¹⁰ See Statement of Administration Policy, Office of Management and Budget (November 10, 2003).

repealed the Commission's authority to modify that term. As the Supreme Court has observed, "[i]t is of course not true that whenever Congress enacts legislation using a word that has a given administrative interpretation it means to freeze that administrative interpretation in place."¹¹ The D.C. Circuit similarly has held that "to freeze an agency interpretation, Congress must give a strong affirmative indication that it wishes the present interpretation to remain in place."¹² As detailed above, there is no such "affirmative indication"—much less a strong one—in the language or the legislative history of the CAA or the 1996 Act and to imply one also would do violence to the "cardinal principle of statutory construction" that disfavors repeals by implication.¹³

B. Construing the CAA as Preventing the Commission from Modifying the UHF Discount Would Produce Illogical and Inconsistent Results With Respect to the Commission's Rulemaking Authority.

To imply that Congress somehow codified the UHF discount in the CAA also would lead to illogical and inconsistent results with respect to the Commission's rulemaking authority.

First, the illogical. It is undisputed that once broadcasters complete their transition from analog to digital television signals there will be no technological difference between a UHF and VHF station. Recognizing this fact, the Commission committed in its *2002 Report and Order* to sunset the UHF Discount for stations owned by the top four networks as the digital transition is completed, noting that "the digital transition will largely eliminate the technical basis for the UHF discount

¹¹ *Lukhard v Reed*, 481 U.S. 368, 379 (1987).

¹² *AFL-CIO v. Brock*, 835 F.2d 912, 916 (D.C. Cir. 1987); *see also Peoples Federal Savings and Loan Assoc. of Sydney v. Commissioner*, 948 F.2d 289, 302-303 (6th Cir. 1992); *General American Transport Corp. v. ICC*, 872 F.2d 1048, 1053 (D.C. Cir. 1989).

¹³ *See United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976).

because UHF and VHF signals will be substantially equalized.”¹⁴ If the Commission is not permitted to sunset the UHF discount when the digital transition occurs and UHF stations reach as much of the audience as VHF stations, the new 39 percent ownership cap will actually permit a company to reach 78 percent of the national television audience. Given the fervor with which Congress reacted to the Commission’s decision to increase the cap to 43 percent, the notion that Congress would set the cap back to 39 percent, while simultaneously, permitting companies to increase their audience reach to 78 percent pending completion of the digital transition would result in an action so illogical as to border on the absurd.

Next, the inconsistent result. Congress first referenced the term “national audience reach” in Section 202(c) of the 1996 Act:

(1) NATIONAL TELEVISION OWNERSHIP LIMITATIONS.—The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)—

* * *

(B) by increasing the national audience reach limitation for television stations to 35 percent.

If Congress’s reference to “national audience reach” was sufficient to imply that it had codified the Commission’s existing definition of that term, the Commission would have lacked any authority to change the definition of “national audience reach”—including the UHF discount—in either its 1998 or 2002 Biennial Regulatory Review of its broadcast ownership rules.¹⁵ Yet the Commission

¹⁴ 2002 Report and Order ¶ 591

¹⁵ See 1998 Biennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Inquiry*, 13 FCC Rcd 11276 (1998)(1998 Notice); 2002 Biennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules

considered modifying or eliminating the UHF discount during both of these proceedings. In its 1998 *Notice* the Commission asked “whether the UHF discount should be retained, modified, or eliminated,” and concluded in its 1998 *Biennial Review Report* that “for the present time, the UHF discount remains necessary in the public interest.”¹⁶ In its 2002 *Notice*, the Commission specifically sought comment regarding (1) “the relevancy and the efficacy of the UHF Discount” and (2) whether the calculation of “national audience reach” should be modified to count the number of households actually viewing the stations rather than the number of households passed.¹⁷ The Commission’s *Report and Order* retained the 50% UHF Discount but indicated the Commission would sunset the UHF Discount for stations owned by the top four networks as the digital transition is completed because “the digital transition will largely eliminate the technical basis for the UHF discount because UHF and VHF signals will be substantially equalized.”¹⁸ To declare that Congress’s reference to the term “national audience reach” in the 1996 Act codified the Commission’s existing definition would be wholly inconsistent with the Commission’s review of the UHF discount in both its 1998 and 2002 review of its broadcast ownership rules. There was no dispute that the Commission had the authority to address the UHF Discount after enactment of the 1996 Act, and there is nothing in the CAA to conclude that the Commission somehow lacks that authority now.

Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, 17 FCC Rcd 18503 (2002)(2002 *Notice*).

¹⁶ 1998 Biennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Biennial Review Report*, 15 FCC Rcd 11058 (2000) ¶¶ 21, 35-38.

¹⁷ 2002 *Notice*, ¶¶ 130, 155.

¹⁸ 2002 *Report and Order*, ¶¶ 586, 591

II. The CAA's Language Prohibiting Further Commission Review of the Cap Is not Applicable To the UHF Discount.

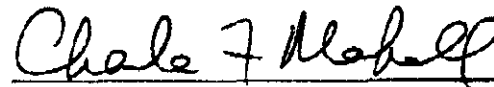
Because the CAA does not address the UHF discount, the provision in the CAA prohibiting the Commission from reviewing the new 39 percent cap is not applicable to the UHF discount. Section 629(3) of Division B of the CAA prohibits the Commission from further review of "any rules relating to the 39 percent national audience reach limitation[.]" The plain terms of the statute prevent modification of rules "relating" to the *limitation* on the national audience reach. A rule "related" to the numerical cap may include rules to raise, lower, or eliminate the numerical cap, or possibly a rule regarding the granting of waivers for companies who may exceed the numerical cap. The UHF discount, on the other hand, relates solely to the methodology used to calculate national audience reach—not what the proper numerical limit of the cap should be. As there is nothing in the statute or the legislative history of the CAA to show that Congress intended to take *any* action with respect to the UHF discount, there is no basis for extending the prohibition on further review of the cap to include the UHF discount.

Conclusion

For the reasons set forth above, the enactment of the CAA pertained only to the national ownership cap and did not affect the authority of the Commission to modify or repeal the UHF discount in the future.

Respectfully submitted,

HEARST-ARGYLE TELEVISION, INC.


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March 19, 2004